

1 Bruce S. Sostek, admitted *pro hac vice*
bruce.sostek@hklaw.com
2 Richard L. Wynne, Jr., admitted *pro hac vice*
richard.wynne@hklaw.com
3 Adrienne E. Dominguez, admitted *pro hac vice*
adrienne.dominguez@hklaw.com
4

HOLLAND & KNIGHT LLP

5 One Arts Plaza
1722 Routh Street, Suite 1500
6 Dallas, Texas 75201
Telephone: (214) 969-1700
7 Facsimile: (214) 969-1751

8 John V. Picone II, Bar No. 187226
jpicone@hopkinscarley.com

9 **HOPKINS & CARLEY**
A LAW CORPORATION

10 The Letitia Building
70 South First Street
11 San Jose, CA 95113-2406
Mailing address:
12 P.O. Box 1469
San Jose, CA 95109-1469
13 Telephone: (408) 286-9800
Facsimile: (408) 998-4790

14 ATTORNEYS FOR PLAINTIFFS

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16 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

17
18 BROADCOM CORPORATION *et al.*,

19 Plaintiffs,

20 v.

21 NETFLIX, INC.,

22 Defendant.

23 Case No. 3:20-cv-04677-JD

24
25 **PLAINTIFFS' ADMINISTRATIVE**
MOTION TO STRIKE NETFLIX'S NON-
COMPLIANT REPLY BRIEFS

26 Date:

Time:

Dept. Courtroom 11, 19th Floor

Judge: Honorable James Donato

27 Trial Date: February 12, 2024

28

1 Plaintiffs Broadcom Corporation and Avago Technologies International Sales Pte. Ltd.
 2 (“Broadcom”) file this administrative motion to strike the non-complaint reply briefs [ECF 483,
 3 485] that Defendant Netflix, Inc. (“Netflix”) filed in support of its motion to strike certain opinions
 4 of Broadcom’s expert Dr. Iain Richardson (“Dr. Richardson”) [ECF 432]. This administrative
 5 motion is supported by the declaration of Broadcom’s counsel Richard L. Wynne, Jr. The parties
 6 conferred about this motion on August 4, 2023, but no agreement could be reached.

7 **I. INTRODUCTION**

8 In its baseless attempts to strike Dr. Richardson’s opinions [ECF 432], Netflix has now filed
 9 *two* reply briefs [ECF 483, 485] that violate the rules of this Court. The first reply (i) was 14 pages
 10 long in violation of Rule 18 of this Court’s *Standing Order for Civil Cases Before Judge James*
 11 *Donato* (dated Jan. 5, 2017) (“Standing Order”); (ii) introduced new evidence, despite established
 12 precedent that a party is not entitled to submit new evidence with a reply; and (iii) includes false
 13 and irrelevant *ad hominem* personal attacks against Broadcom’s counsel. [ECF 483]. After
 14 Broadcom’s counsel told Netflix that Broadcom planned to file an administrative motion to strike
 15 the reply based on the grounds above, Netflix filed a “corrected” reply [ECF 485] after the reply
 16 deadline, without conferring with Broadcom and without seeking leave of Court.

17 **II. FACTUAL AND PROCEDURAL BACKGROUND**

18 On July 7, 2023, Netflix filed a motion to strike certain of Dr. Richardson’s opinions. On
 19 July 21, 2023, Broadcom filed its response in opposition to Netflix’s motion [ECF 453]. On July
 20 31, 2023, Netflix filed a reply in support of its motion to strike [ECF 483].

21 By email dated August 2, 2023, Broadcom’s counsel advised Netflix’s counsel that
 22 Broadcom intended to file an administrative motion to strike Netflix’s reply, noting that “Netflix’s
 23 reply improperly submits new evidence, includes improper *ad hominem* attacks about Broadcom’s
 24 counsel, and violates Judge Donato’s Standing Orders,” and seeking Netflix’s counsel’s availability
 25 to confer on August 3. Wynne Decl., Ex. 1: Aug. 2, 2023 Email from R. Wynne to S. Jacob. Netflix
 26 did not respond to—or even acknowledge—Broadcom’s request for a conference. Instead, Netflix
 27 filed—without conferring with Broadcom’s counsel, and without seeking leave of Court—at 6:52
 28 p.m. on August 2, 2023 (five days after the reply deadline), a “corrected” reply in support of its

1 motion to strike Dr. Richardson’s opinions [ECF 485]. The “corrected” reply did not correct a typo
 2 or other clerical error—rather, Netflix filed a new, overhauled 10-page reply.

3 Within minutes of Netflix’s filing, Broadcom’s counsel advised that Broadcom opposed
 4 Netflix’s “filing of a substitute reply brief after the reply deadline without leave of court,” and
 5 stated that it would note Netflix’s refusal to confer. Wynne Decl. Ex. 2. Netflix’s counsel responded
 6 to the follow-up email and asserted that “Netflix is not refusing to meet and confer” despite its
 7 silence on the initial request for conference. The parties discussed the relief sought by this motion
 8 on August 4, and Netflix indicated that it is opposed.¹

9 III. ARGUMENT

10 A. The first reply brief [ECF 483] should be stricken.

11 1. Netflix’s brief violates the Court’s Standing Order concerning page limits.

12 The Court’s Standing Order provides that, “[e]xcept for summary judgment and class
 13 certification motions, opening and opposition briefs may not exceed 15 pages, and reply briefs may
 14 not exceed 10 pages.” Standing Order, ¶ 18. In violation of that rule, Netflix filed a 14-page reply.
 15 [ECF 483]. For this reason alone, the Court should strike Netflix’s first reply brief [ECF 483]. See,
 16 e.g., *Seifi v. Mercedes-Benz U.S.A., LLC*, No. 12-cv-05493-TEH, 2014 WL 8370026 (N.D. Cal.
 17 Dec. 17, 2014) (striking motion to strike summary-judgment evidence filed in violation of page
 18 limitations in local rules related to summary-judgment opposition briefing).

19 2. Netflix’s brief improperly submits new evidence with a reply

20 Courts in this district have been clear that presenting new evidence attached to a reply is
 21 improper. See, e.g., *Rivera v. Saul Chevrolet, Inc.*, 2017 WL 3267540, at *8 n.5 (N.D. Cal. July 31,
 22 2017) (“the Court need not consider this declaration because presenting new evidence attached to
 23 a reply brief is improper.”) (citing *Contratto v. Ethicon*, 227 F.R.D. 204, 308-09 n.5 (N.D. Cal.
 24 2005); *Andrade v. Am. First Fin., Inc.*, No. 18-cv-06743-SK, 2022 U.S. Dist. LEXIS 178670, at *6
 25 (N.D. Cal. Sept. 29, 2022) (“generally, a party is not entitled to submit new evidence with their

27 ¹ During the meet and confer, Netflix acknowledged that its brief was overly long and purported
 28 to explain that it had noticed that fact itself prior to Broadcom’s email. Yet Netflix did not note
 that in any response to Broadcom; nor did it explain why it took five days to correct the issue.

1 reply brief, especially when such evidence could have been collected and submitted earlier").

2 Nevertheless, Netflix submitted with its reply new evidence, consisting of an excerpt from
 3 the transcript of the deposition of Dan Julius. ECF 483, p. 8 (lines 10-12) & Ex. 19. This deposition,
 4 *in which Netflix actively participated*, was taken on November 30, 2022, and it could have been
 5 attached as an exhibit to Netflix's motion. Instead, Netflix attached it to its reply without seeking
 6 leave of Court to do so. The Court should strike Exhibit 19 to the reply and all statements in the
 7 reply referencing or relying on Exhibit 19. *See, e.g., Shim v. Lawler*, No. 17-cv-04920-EMC, 2019
 8 WL 2996443, at *7 (N.D. Cal. July 9, 2019) (striking new exhibits in reply) (citing *Rodgers v.*
 9 *Chevys Rests., LLC*, No. C13-03923 HRL, 2015 WL 909763, at *5 (N.D. Cal. Feb. 24, 2015)).

10 **3. Netflix's brief includes irrelevant *ad hominem* attacks on Broadcom's counsel.**

11 Netflix's Reply claims that Broadcom "misrepresents the facts regarding its interactions
 12 with Beamr," falsely asserts that Broadcom obtained Beamr's source code under a "secret deal,"
 13 and that Broadcom lied about not having Beamr source code. ECF 483, pp. 1, 8. These arguments
 14 are baseless *ad hominem* personal attacks against Broadcom's counsel that have no place here.

15 First, as to the so-called "secret deal": If it is a secret, it is the worst-kept secret in the case.
 16 Broadcom produced to Netflix a copy of the agreement in November 2022, eight months before
 17 Netflix attached the agreement to its motion to strike [ECF 432, Ex. 13]. Wynne Decl. ¶ 6. Although
 18 the agreement speaks for itself, Broadcom notes that it entered into the agreement with Beamr to
 19 resolve ongoing discovery disputes so as to facilitate the production of Beamr's source code,
 20 Beamr's agreements with Netflix, and other relevant documents. Further, Beamr agreed to provide
 21 a witness to testify on deposition. [ECF 432, Ex. 13, ¶¶ 1-3, 7]. Netflix participated in the
 22 deposition of Beamr's witness and examined that witness about the agreement. Wynne Decl. ¶ 6.
 23 Nonetheless, in its Reply, Netflix makes wildly inaccurate representations about the nature and
 24 content of the agreement.

25 A simple reading of the agreement reveals Netflix's misrepresentations. Broadcom stated
 26 in the agreement [REDACTED]

27 [REDACTED] [ECF 432, Ex. 13, ¶ 4]. Broadcom sought to
 28 allay any concern that it would use the information Beamr supplied in a proceeding against Beamr.

1 [ECF 432, Ex. 13, ¶¶ 4, 6]. And, because Beamr [REDACTED]
 2 [REDACTED]
 3 [REDACTED] [ECF 432, Ex. 13, ¶ 9].

4 Thus, Netflix’s arguments that this was a “secret deal,” and its insinuation that there was
 5 anything untoward about the arrangement is puzzling. The agreement was not secret (although the
 6 agreement contemplated that it would not be filed in an Israeli court [ECF 432, Ex. 13, ¶ 10]). And
 7 contrary to what Netflix argues (*i.e.*, “Broadcom promised not to sue Beamr for infringement”),
 8 [ECF 483, p. 8 (lines 6-7)], the plain language of the agreement confirms its limited scope to this
 9 action: [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

14 [REDACTED] [ECF 432, Ex. 13, ¶¶ 4, 6]. At bottom, Netflix is
 15 casting baseless aspersions at Broadcom and its counsel about its arrangement with Beamr.

16 Second, Netflix is egregiously wrong in its reliance on a so-called “misrepresentation” about
 17 having Beamr’s source code. Netflix cites to a transcript of a meet-and-confer that dealt with the
 18 deposition testimony of a *Netflix* 30(b)(6) witness who **would not be testifying** as to Beamr source
 19 code. At the time of that call, the review of Beamr source code had started and was ongoing, and
 20 Broadcom had not received printouts from that review. Wynne Decl. ¶ 7. When Netflix’s counsel
 21 asked whether Broadcom’s counsel had Beamr source code, Broadcom’s counsel replied “no,”
 22 referring to production of code as contemplated by the Protective Order in this case. [ECF 105,
 23 106]. Broadcom’s counsel was not thinking about the “snippets” (a handful of lines of code across
 24 multiple files) that his co-counsel had received by email. *See id.* But the snippets were just that:
 25 snippets. They were sent to facilitate the anticipated review of the Beamr source code. *Id.* Netflix’s
 26 attempt to elevate these limited lines to significance fails. If the “snippets” were all that was
 27 required, the inspection of Beamr’s source code would have been unnecessary. Notably, Netflix
 28 does not suggest that Broadcom’s experts relied on the snippets as opposed to the printouts, which

1 Broadcom promptly sent to Netflix upon receipt from Beamr. In sum, Netflix’s arguments about
 2 counsel not recalling snippets—when an actual review of source code was ongoing at the time of
 3 the call, which would lead to printouts—is a baseless attack against Broadcom’s counsel.

4 **4. Netflix’s arguments about the Beamr code review are not relevant.**

5 Aside from being improper personal attacks, Netflix’s arguments are nothing more than a
 6 distraction. The real issue—as addressed in Netflix’s motion and Broadcom’s response—is whether
 7 Broadcom had an obligation to amend its infringement contentions to specifically reference the
 8 Beamr source code, even though such code is [REDACTED] open-source code charted
 9 in Broadcom’s infringement contentions with respect to the accused functionality. *See* Broadcom
 10 Response, [ECF 453]. Thus, Netflix’s arguments about the so-called “secret agreement” and about
 11 “key” source code snippets are not only wrong but irrelevant, and have no bearing on the resolution
 12 of Netflix’s complaints about the sufficiency of Broadcom’s infringement contentions.

13 For any or all of these reasons, Netflix’s first reply [ECF 483] should be stricken.

14 **B. The second reply brief [ECF 485] should be stricken.**

15 By email dated August 2, 2023, Broadcom’s counsel highlighted the deficiencies with
 16 Netflix’s first reply brief and requested that Netflix’s counsel provide his availability to confer on
 17 an administrative motion to strike. Wynne Decl., Ex. 2. Rather than agreeing to confer as the rules
 18 require, Netflix filed—without conferring with Broadcom, and without seeking or obtaining leave
 19 of Court—a “corrected” reply [ECF 485]. The second reply was filed 5 days after the July 28 reply
 20 deadline. By the “corrected” brief, Netflix didn’t fix a typo or make any other ministerial correction.
 21 Rather, Netflix filed a new, overhauled 10-page reply, in which it purported to correct one
 22 deficiency (the page-limitations violation), but left in place the other deficiencies: new evidence
 23 was still attached to the reply, and the personal attacks on Broadcom remained. Accordingly,
 24 Netflix’s second reply [ECF 485]—filed late and without leave of Court—should be stricken.

25 **IV. CONCLUSION**

26 For the foregoing reasons, Broadcom respectfully respects that the Court strike Netflix’s
 27 two reply briefs [ECF 483, 485] filed in support of its motion to strike Dr. Richardson’s opinions.

28

1 Dated: August 4, 2023

/s/ *Richard L. Wynne, Jr.*

2 Richard L. Wynne, Jr.
3 HOLLAND & KNIGHT LLP

4 ATTORNEY FOR PLAINTIFFS
5 BROADCOM CORPORATION and
6 AVAGO TECHNOLOGIES INTERNATIONAL
7 SALES PTE. LIMITED

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